U.S. Department of Justice

Environment and Natural Resources Division

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90-11-3-608A

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June 21, 1996

Stuart J. O'Hare
Clerk of the Court
United States District for the
Southern District of Illinois
301 W. Main Street
Benton, IL 62812

Att'n: Civil Clerk's Office

Re: United States v. NL Industries, Inc., et al.
Civ. No. 91-578-JLF

Dear Mr. O'Hare:

Enclosed please find for filing the original and one copy of the following documents to be filed on behalf of the United States in the above referenced action:

1. UNITED STATES' MOTION FOR EXTENSION OF TIME TO RESPOND TO MOTIONS OF THE CITY AND THE DEFENDANTS FOR TEMPORARY RESTRAINING ORDER.

2. MEMORANDUM IN SUPPORT OF THE UNITED STATES' MOTION FOR EXTENSION OF TIME TO RESPOND TO MOTIONS OF THE CITY AND THE DEFENDANTS FOR TEMPORARY RESTRAINING ORDER.

Could you please file the enclosed with the Court and return a file-stamped copy for my records. I have enclosed a self-addressed envelope for your convenience.

In anticipation of a telephonic status conference with the Court, scheduled for today, we have provided a courtesy copy to Judge Foreman's chambers via fax.

I thank your for your assistance, please feel free to contact me with any questions.

Sincerely,

John H. Grady

cc: All Counsel of Record

UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF ILLINOIS

THE UNITED STATES OF AMERICA, Plaintiff, vs. NL INDUSTRIES, INC., et al. Defendants, and CITY OF GRANITE CITY, ILLINOIS, et al. Intervenor/Defendants.	Civil Action No. 91 CV 00578-JLF

MOTION OF THE UNITED STATES
FOR EXTENSION OF TIME TO RESPOND TO
DEFENDANTS' MOTIONs FOR TEMPORARY RESTRAINING ORDER

Plaintiff the United States hereby files this Motion for Extension of Time to respond to Granite City's and the other defendants' motions for temporary restraining order, and the motions for leave to file amended counterclaim and amended answer.

1. On or about June 10, 1996, the City of Granite City filed a Motion for Temporary Restraining Order to enjoin the United States from continuing with the cleanup of lead contaminated residential soil in Granite City.

2. On or about June 11, 1996, Defendants NL Industries, Inc., Johnson Controls, Inc., AT&T Corp., Allied-Signal Inc., Gould Electronics, Inc., and General Battery Company (the "PRP Defendants") filed a motion for temporary restraining order. In

support of their motion, the PRP Defendants largely adopted by reference the City's arguments in support of its motion. The PRP Defendants also filed a motion for leave to file an amended counterclaim and AT&T filed a motion for leave to file an amended answer.

3. The cleanup activities that are the subject of the City's and the PRP Defendants' motions for preliminary relief have been ongoing continuously for more than ten months.

4. To respond fully to the City's and the PRP Defendants' motions would require a briefing on the merits in defense of EPA's decision selecting the remedy to address contamination originating at the NL Industries site.

5. In addition, such a briefing in defense of EPA's decisionmaking process is not appropriate at the present time, given the posture of the litigation.

6. In any event, the City and the PRP Defendants have not sufficiently indicated, under the applicable standards for preliminary relief, why their motion must be resolved on an expedited basis.

7. For the foregoing reasons, and as more fully set forth in the Memorandum in support of this Motion, the United States respectfully requests that it be given an extension of time to respond to the City's and the PRP Defendants' motions. The United States proposes that the Court set a briefing schedule at

the time that it rules on the pending motions on the scope and standard of record review.

Respectfully submitted,

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UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF ILLINOIS

THE UNITED STATES OF AMERICA, Plaintiff, vs. NL INDUSTRIES, INC., et al. Defendants, and CITY OF GRANITE CITY, ILLINOIS, et al. Intervenor/Defendants.	)	Civil Action No. 91 CV 00578-JLF

MEMORANDUM IN SUPPORT OF THE UNITED STATES' MOTION FOR EXTENSION OF TIME TO RESPOND TO GRANITE CITY'S MOTION FOR TEMPORARY RESTRAINING ORDER

The United States respectfully submits this memorandum in support of its Motion for Extension of Time to Respond to Granite City's Motion for Temporary Restraining Order.[1] As stated more fully below, the City seeks emergency consideration of its motion to enjoin the United States from performing environmental cleanup activities that have been continuously ongoing for more than ten months; and the motion is prompted, according to the City, by a report that is based on data substantially collected more than 18

[1] The other defendants to this action have joined the City's motion and adopted its arguments. The United States will address any standing and related issues in regard to those defendants, as well as to the City, in its briefs in opposition to the TRO motions. The defendants have also filed a motion for leave to file an amended counterclaim and AT&T has filed a motion for leave to file an amended answer. The United States seeks an extension to respond to all of these motions.

months ago. The timing of the release of that report and thus the emergency alleged by the City have been exclusively controlled by the City.

As is plain from the face of the City's pleadings and the history of this case, the City has filed the present motion to evade the on-the-record review of U.S. EPA's decisions that the Court will soon undertake in the regular course of the litigation. For the reasons set forth below, such a review on the merits of the City's and the other defendants' attack on EPA's remedy selection is not appropriate in the context of a hearing for preliminary relief.

To the extent that the Court does not conclude that such a request by the City for emergency relief is inappropriate at this time, the United States requests that it have additional time to fully brief the issues that must be resolved by the Court in determining whether to award preliminary relief.

Background

On June 10, 1986, after notice and public comment, U.S. EPA determined that conditions at and around the former NL Industries' lead-smelting site posed such an imminent and substantial endangerment to human health and the environment that cleanup of the areas contaminated by operations at the site should be addressed with the limited resources of the Superfund. As a result, the site was placed on the National Priorities List

of the most contaminated sites in the nation, and cleanup activities were begun.

After an investigation and feasibility study of conditions at the site were completed by NL Industries under U.S. EPA supervision, U.S. EPA issued a Record of Decision on March 30, 1990, setting forth the remedy that the agency had selected to address the widespread contamination originating at the site. Under the selected remedy, piles of lead-contaminated soils on and around the site would be consolidated into a single pile (the Taracorp pile) and capped with impermeable clay to prevent any further spread of contamination; the groundwater would be monitored to track and, if necessary, address any groundwater plumes; and the residential, commercial, and public soils and properties contaminated by lead dust from the facility would be cleaned to a level that would minimize risk to residents of the community while taking into account the substantial costs of such remedial work.

On November 27, 1990, EPA issued an order to certain parties to undertake the cleanup activities at the site, pursuant to Section 106 of the Comprehensive Environmental Response, Compensation and Liability Act ("CERCLA"), 42 U.S.C. § 9606. Those parties, the same defendants that have joined the City's motion for a TRO, were subject to the Section 106 order because they had been identified by U.S. EPA as parties that were potentially liable for the contamination at the site. Each of

those parties (the "PRP Defendants") refused to comply with the Section 106 order.

On July 31, 1991, the United States brought the current civil action to recover its past costs at the site, pursuant to Section 107 of CERCLA, 42 U.S.C. § 9607, and for penalties and injunctive relief against the PRP Defendants for their failure to comply with the Section 106 order. In the meantime, cleanup activities at the site progressed.

In 1994, the City of Granite City, as intervenor-defendant, moved to enjoin the United States' cleanup of lead-contaminated residential property in Granite City. After reaching a resolution regarding the City's motion, U.S. EPA re-opened the administrative record to consider new information submitted by the City and others; and on October 6, 1995, U.S. EPA issued a second decision document that altered some aspects of the remedy not at issue here and reaffirmed the agency's existing residential cleanup goal of remediating soils contaminated by dust from the site to a level of 500 parts per million ("ppm") of lead. Many of the houses to be cleaned are in Granite City, although a large number of the houses to be cleaned are in the cities of Madison and Venice.[2] The PRP Defendants had previously

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[2] The cities of Madison and Venice have not intervened in this action. Indeed, they have cooperated with U.S. EPA in facilitating its cleanup of property within their borders. The City of Granite City, in addition to filing the present and previous TRO motions to terminate the residential soil cleanup entirely, has blocked cleanup of the sidewalks and other public property adjoining the residences within the City's borders, and has thereby prevented the cleanup from properly addressing some aspects of the threat posed by the lead contamination.

agreed to clean the residential soils to a level of 1000 ppm lead, see City's Brief at 18; but U.S. EPA concluded that cleanup to 1000 ppm would not sufficiently protect against the risk posed by the lead to human health and the environment.

On or about June 10, 1996, the City again filed a motion for a TRO that would force the government to cease its residential cleanup activities. The PRP Defendants joined the City's motion.

Discussion

Although the City has appended affidavits to its motion relating to economic harm, the City's cover letter to the government is clear that the timing of the present TRO request is driven by the recent completion of a study prepared by the City's expert witness, Dr. Bornschein, relating to cleanup of lead in soils surrounding the residences in Granite City.[3] See Fitzhenry Letter to Gelman and Grady, at 1-2 (May 8, 1996).[4] As the City states in the memorandum supporting its motion, "[t]he issue in the present case is whether permitting soils, particularly those which have less than 1,000 ppm lead, to remain around the Site

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[3] Indeed, the City previously submitted comments from the same affiants raising the same economic issues to U.S. EPA during the public comment period. Those comments are included in the Supplemental Administrative Record ("SAR").

[4] In explaining in the letter the reasons for filing the motion for a TRO at the present time, the City says of the Bornschein report: "The study is just now completed. . . . [T]his information could not have been submitted during the public comment period because the study has only recently been completed. . . . Dr. Bornschein's study is of utmost importance to Granite City and goes to the heart of many of the issues in the case."

raises an environmental or health threat." City's Brief at 9. The core of the City's argument, in other words, is that, whereas remediating the soil lead levels to 1000 ppm is acceptable -- a position that the City admits in its brief has been taken even by the PRP Defendants that will be paying for the cleanup -- the agency decision to remediate to the more stringent level of 500 ppm poses such a clear threat to human health and the environment that the remedy selected by U.S. EPA, after consideration of an immense administrative record and consultation with experts in the field, should be enjoined in an order "preventing U.S. EPA from proceeding with the residential cleanup in Granite City, Illinois." City's Brief at 44.

To accomplish its goal of halting the residential cleanup, the City has chosen to file a motion for a TRO. Under Rule 65(b) of the Federal Rules of Civil Procedure, a TRO is designed to address matters that are such an emergency that even notice to the other party and a hearing on the merits are not required if effecting the notice or holding the hearing would delay issuance of the order. See C. Wright & A. Miller, 11A Federal Practice and Procedure, at § 2951 (2d ed. 1995). No emergency exists in the present matter. The residential cleanup has been proceeding continuously for more than ten months now, and was undertaken only after EPA -- the agency designated by CERCLA and the other environmental statutes to develop the expertise required to protect human health and the environment, see, e.g., 42 U.S.C. § 9604; 40 C.F.R. Part 300 -- determined that the cleanup goals

were consistent with the statutory mandates of CERCLA. In any event, as a practical matter, the residential cleanup to date has focussed on the most contaminated property, nearly all of which is contaminated in excess of 1000 ppm lead, and such properties will continue to be the focus of the cleanup activities for at least the next several months. As a result, a TRO is not the appropriate form of relief in the present matter.

To the extent that the City is in fact seeking relief more in the nature of a preliminary injunction, the United States requests that it be granted sufficient time to brief the issues on the merits, given that the likelihood of success on the merits is one of the factors to be evaluated by a court in determining whether to issue a preliminary injunction. See Curtis v. Thompson, 840 F.2d 1291, 1296 (7th Cir. 1988). As the United States set forth in its brief on the scope and standard of record review, filed on February 22, 1996, a ruling on the merits in this action will require a determination by the Court, pursuant to Section 113(j) of CERCLA, 42 U.S.C. § 9613(j), of whether, based on the administrative record in this matter (which comprises 21 large volumes of documents), the remedy selected by the government is arbitrary and capricious. To prepare a defense of the agency's decision-making process against the attacks in the City's brief -- the vast bulk of which tracks exactly what a merits brief under Section 113(j) of CERCLA would encompass -- the United States will need to undertake a thorough presentation of the record and the reasons that the record supports the

government's decisions. Such an effort would benefit from the additional time necessary to present the matters comprehensively and clearly.

From a procedural perspective, additional time will allow the further briefing in the case to proceed in an orderly fashion. The Court already has before it extensive briefing on the scope and standards to be used in a review of the agency's decision-making. To brief the merits of that decision-making before receiving the Court's ruling on the appropriate scope and standards to be used in reviewing such decision-making will only muddy the issues to be presented in a brief on the merits, and thus be premature.

In any event, the City has not presented any sufficient reasons for forcing a decision now on the issues that will be addressed in briefs on the merits. The burden on a moving party seeking preliminary relief is high. It is well-established that a preliminary injunction is "extraordinary relief" that should be granted to a movant only upon a "'clear showing' that she is entitled to such relief." Haussman v. Chicago Bd. of Education, 737 F. Supp. 56, 57 (N.D. Ill. 1990) (quoting 11 C. Wright & A. Miller, Federal Practice and Procedure, § 2948, at 428-29 (1973)); accord Bieros v. Nicola, 857 F. Supp. 445, 446 (E.D. Pa. 1994) ("[I]t is not enough to establish a risk of irreparable harm, rather, there must be a clear showing of immediate irreparable injury."); Glisson v. United States Forest Service, 805 F. Supp. 647, 649 (S.D. Ill. 1992). And in the present case,

the burden on the City to make a clear showing of entitlement to relief must be satisfied in the context of the legal standard providing that decisions of an expert agency can be overturned only if the decision is arbitrary and capricious, particularly if the decision relates to a scientific issue within the agency's special expertise. See Marsh v. Oregon Natural Resources Council, 490 U.S. 360, 377-8 (1989) (holding that in a hearing under the arbitrary and capricious standard, "[w]hen specialists express conflicting views, an agency must have discretion to rely on the reasonable opinions of its own qualified experts even if, as an original matter, a court might find contrary views more persuasive.").

Even on the face of its pleadings and support, the City has not made the kind of clear showing necessary to justify the extraordinary relief sought. Despite the forceful tone of the City's brief, Dr. Bornschein's report is far from definitive. Throughout the report, Dr. Bornschein merely questions whether remediation of the contaminated soils before cleanup of residential lead paint or further cleanup of the Taracorp pile is the most efficient way to proceed, and whether the residential soil remedy selected by the agency is as effective in reducing soil lead levels as hoped. See, e.g., Bornschein Report at 19 (concluding that his "findings may reflect the continuing contribution of interior paint to interior dust lead levels" and that street dust "may serve as an important interior dust contamination source if it is tracked into or blown into

dwellings") (emphasis added); id. at 2 ("[T]he study results cast doubt on the efficacy of soil removal."). Indeed, when Dr. Bornschein discusses the two possible negative effects he has identified relating to the cleanup activities, he speaks in even more tentative terms, stating, for instance, that "soil remediation can increase dust lead concentrations" and that the remediation activities might give the people "a false sense of security." Id. at 24.[5] Such statements do not adequately support the relief sought by the defendants under the ordinary standard for preliminary injunctions, which requires more than a mere risk of harm, see Bieros, 857 F. Supp. at 446; New Jersey Ass'n of Health Care Facilities v. Gibbs, 838 F. Supp. 881, 917 (D.N.J. 1993) (holding that a "'risk of irreparable harm is not enough'") (quoting ECRI v. McGraw-Hill, Inc., 809 F.2d 223, 226 (3d Cir. 1987); Goldie's Bookstore, Inc. v. Superior Court of the State of California, 739 F.2d 466, 472 (9th Cir. 1984) ("Speculative injury does not constitute irreparable injury."); even less do such statements support the issuance of preliminary relief when the movant is challenging the allegations and conclusions of an expert agency under the arbitrary and capricious standard of review.

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[5] In fact, Dr. Bornschein previously concurred with the other experts in this case, including the PRP Defendants' experts, that development of other remedial strategies "should be undertaken without any reduction in the rate of current or planned residential soil remediation activities." See Consensus Statement: Ad Hoc Expert Committee on Lead Contamination in the Madison County/Granite City Area, in the SAR, # 353, at 6, ¶ 4 (Feb. 7, 1995).

In any case, irrespective of the City's motion, U.S. EPA has already begun to evaluate the report submitted by the City.[6] The agency is currently in the process of entering the report into the administrative record pursuant to 40 C.F.R. § 300.825(c), as requested by the City, and will review the report's findings in the context of the agency's understanding of the conditions and cleanup activities at the site and in Granite City. Once that review is complete, the agency will be prepared to defend any decisions with respect to the report under the same standard being applied to the other decisions in this matter based on the administrative record.[7] In the meantime, however, there has been no demonstration that emergency relief is warranted.[8]

Conclusion

For the foregoing reasons, the United States respectfully requests that it be given an extension of time to respond to the City's and the PRP Defendants' motions. The United States

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[6] It is worth noting that the report, on its face, is incomplete (Figure 5-2, for example, is listed as "To be provided"), and much of the underlying data, which the agency has been seeking from the City for __ months, is still not attached.

[7] Along with the Bornschein report, the agency will also be placing into the administrative record the Hewings and Baudenistel affidavits, which are attached to the City's motion.

[8] The City, as well as defendant Johnson Controls, have also asserted that CERCLA is unconstitutional, based primarily on the Supreme Court's decision in United States v. Lopez, 115 S. Ct. 1624 (1995). Neither defendant seems to suggest that the constitutional argument raises any issues requiring preliminary relief. The United States will address the constitutional arguments in its opposition to the TRO, as well as in any further appropriate briefing.

proposes that the Court set a briefing schedule at the time that it rules on the pending motions on the scope and standard of record review. An appropriate Order is attached.

Respectfully submitted,

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UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF ILLINOIS

THE UNITED STATES OF AMERICA, Plaintiff, vs. NL INDUSTRIES, INC., et al. Defendants, and CITY OF GRANITE CITY, ILLINOIS, et al. Intervenor/Defendants.	Civil Action No. 91 CV 00578-JLF

ORDER

After consideration of the City of Granite City's and the other defendants' motions for temporary restraining order, the United States' motion for extension of time, and the entire record in this matter, the Court hereby **ORDERS** that the United States' motion for extension of time is granted. After ruling on the pending motions as to the scope and standard of review, the Court will set a schedule for briefing the recently filed motions in this matter, including the City of Granite City's Motion for Temporary Restraining Order, the Defendants' Motion for Temporary Restraining Order, the Defendants' Motion for Leave to File First Amended Counterclaim, and Defendant AT&T Corp.'s Motion for Leave to File Amended Answer.

So Ordered.

Date:

UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF ILLINOIS

UNITED STATES OF AMERICA, Plaintiff, v. NL INDUSTRIES, INC., et al., Defendants, and CITY OF GRANITE CITY, ILLINOIS, LAFAYETTE H. HOCHULI, and DANIEL M. McDOWELL, Intervenor-Defendants.	Civ. No. 91-CV578-JLF

CERTIFICATE OF SERVICE

THIS IS TO CERTIFY that on June 21, 1996, a copy of the the United States' Motion for an Extension of Time to Respond to Motions of the City and the Defendants for Temporary Restraining Order was sent via facsimile and first class mail to the Court and to:

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U.S. v. NL Industries, Inc., et al.
(90-11-3-608A)

(CIV. NO. 91-578-JLF)

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